In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No.

JOSEPH E. MARRON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Part II.

Petitioner proposes to establish the following propositions:

(1) That the Constitutional rights of the petitioner Marron under the Fourth and Fifth Amendments to the Constitution of the United States of America were violated by the reception into evidence, over his objection, of his private books of account, papers and documents, which said private books of

account, papers and documents were in the possession of the United States as the result of an illegal search and seizure.

(2) That *Kirvin v. United States,* 5 Fed. (2d) 282, should be followed as an authority on the facts in the instant case, rather than the first decision in *Marron v. United States,* 8 Fed. (2d) 251.

(3) *Marron v. United States,* 8 Fed. (2d) 251, is in direct conflict with the decision of *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647 and with *U. S. v. Katz,* 70 L. Ed. 554; U. S. S. Ct. Advance Opinions, June 15, 1926, and should, therefore, be expressly overruled.

(4) The Court erroneously permitted the witness Neilsen to give evidence, which if believed, disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment, or the scope of the conspiracy as gathered from the testimony, and in that connection gave to the jury instructions which contained gravely erroneous and prejudicial errors of law.

PRELIMINARY STATEMENT.

The petition herein contains a statement of the facts surrounding the seizure of the gray ledger and other private memoranda of petitioner, but it is deemed advisable to amplify that statement to a brief extent by pertinent references to the transcript of the testimony. The testimony of W. F. Whittier, a former prohibition officer of the United States, reflects the

xact situation concerning the search of said premises, nd the seizure thereon, and because his testimony ontains a complete statement of the facts involved n this controversy, we set it forth at length prelimiarily to the discussion of the legal propositions above eferred to.

His testimony is as follows (Trans. pages 90 to 132):

"Direct Examination by Mr. Bonsall.

* * * My position with the Government at that time was Federal prohibition agent. * * * I believe I was present at a raid at 1249 Polk Street, on or about October 2, 1924. I think Agents Lee, Howard and Eldridge were with me at that time. We had a search-warrant for the place. We found liquor at that time. * * *

Exception No. 1.

* * * I found a book on those premises at 1249 Polk Street, in the City and County of San Francisco, on the 2d day of October, 1924, besides the liquor.

Exception No. 2.

Q. I show you this book and ask you if you have ever seen that book before.

Mr. Smith. We object to the introduction of the book or any testimony with respect to it, upon the following grounds:

That the book was taken from the premises at 1249 Polk Street on the 2d day of October, at which time certain prohibition agents were there under and by virtue of a search-warrant. The search-warrant did not authorize the seizure of this book, or of any papers, or of any memorandum, but only authorized the officers in whose possession the warrant was to seize liquors and the various paraphernalia used in the making of liquor.

The search-warrant that I refer to was issued by Albert M. Hardie, United States Commis-

sioner in and for the Northern District of California, on the 1st day of October, 1924. It was issued upon an affidavit that was sworn to before the Commissioner I have already named on the 1st day of October by C. A. Howard, who therein in said affidavit styled himself as a federal prohibition agent. The warrant that I refer to did not in any manner describe this book or any of the papers seized at that time.

We object to the introduction of any evidence concerning this book, or the book, itself, upon the following ground:

That the seizure of the papers, records and books of account and ledger was done in contravention of the rights of the defendant Marron under the Fourth Amendment to the Constitution of the United States of America, for the reason that the said papers, records, and books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

Second: That the papers, records, and books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private papers and documents and writings of the defendant Marron. That the purported search-warrant only authorized the prohibition agents to search the said premises for the following described personal property, to-wit: Intoxicating liquor, to-wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice, and spiritous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes; stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That the said federal prohibition agents were at the time of the execution of the warrant

aforesaid unlawfully upon the premises, and were at said time and said place trespassers in taking said papers, records, books of account and ledger.

That the papers, records, books of account and ledger were not upon the person of the defendant Marron, but, on the contrary, were located in the said premises hereinabove referred to.

That there was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit that I have heretofore referred to as having been issued by Commissioner Hardie and supported by the affidavit of then Prohibition Agent Howard, for the seizure of the papers, records, books of account, and ledger, and that their taking was illegal and void.

Upon the further ground that the records, papers, and books of account, which are the private and personal writings of the defendant Marron, are immune from seizure, and that the rights of the defendant Marron are also violated under the Fifth Amendment to the Constitution of the United States of America.

The COURT. Q. Were any arrests made at that time?

A. Yes, sir.

Q. Who was arrested?

A. Birdsall.

The COURT. The objection is overruled.

Mr. SMITH. We note an exception.

Mr. BONSALL. Before proceeding any further with the evidence of this witness, I will make a formal offer in evidence of this little gray ledger.

Mr. SMITH. To which we object, if the Court please, on all the grounds set forth in our petition, and on all of the grounds urged yesterday.

The COURT. Objection overruled.

Mr. SMITH. Exception. May all of the objections that were interposed in the various motions filed with your Honor be considered as having

been made at this time to the introduction of this book?

The COURT. Yes.

(Thereupon the book was here introduced in evidence, as the United States Exhibit No. 1.)

Mr. BONSALL. Q. I show you these five papers that are fastened together, and without commenting on them I ask you did you ever see them before?

A. I remember four of them.

Q. Which four do you remember?

A. The water bill, and——

Mr. SMITH. Just a second, I would like to interpose the objection at this time to any interrogation regarding these papers upon all of the grounds I have heretofore urged with respect to the introduction of Exhibit 1 of the Government —I assume that that is the number that has been given to the book, is it?

Mr. BONSALL. Yes, Exhibit 1.

Mr. SMITH. And upon the further ground that there has been no prima facie case of conspiracy established at this time, and that, therefore, any interrogation concerning these papers would be improper.

The COURT. Objection overruled.

Mr. SMITH. Exception.

Mr. BONSALL. Q. I show you this document and without comment I ask you whether you have seen that before.

A. I remember a gas and electric bill. There was a gas and electric bill, and there was a Spring Valley Water bill, and there was a bill from some rattan place, the Coulter rattan place and, if I am not mistaken, a telephone bill.

* * * * * * *

Mr. BONSALL. Q. Did you find a telephone bill at No. 1249 Polk Street, made out to Eddie Marron, for $11.84?

A. Did I find it?

Q. Was it found there?

Mr. SMITH. Now, just a second. We object to that question, if the Court please, as immate-

rial, irrelevant and incompetent, and not binding on the defendant Marron, and as clearly hearsay as to him.

The COURT. Objection overruled.

Mr. SMITH. Exception.

A. These are the papers that were found at 1249 Polk Street. Here is the Spring Valley Water Company bill and here is the telephone bill.

Exception No. 6.

Mr. BONSALL. I now offer in evidence as Exhibit No. 2 a Pacific Gas & Electric bill made out to Eddie Marron, 1249 Polk Street from August 19th to September 19th, 1924, for $11.84.

Mr. SMITH. To which, of course, we object on all the grounds heretofore urged, and upon the further ground that it is nothing but pure hearsay, and that no prima facie case of conspiracy has yet been established.

The COURT. Objection overruled.

Exception No. 7.

Mr. BONSALL. I now offer in evidence a bill of the Spring Valley Water Co. made out to Eddie Marron, 1249 Polk Street, service charge to September 24, 1924, giving the meter reading in the sum of $2.22.

Mr. SMITH. May the same objection be considered as made to that?

The COURT. It may. Objection overruled.

Mr. SMITH. Exception.

Exception No. 8.

Mr. BONSALL. I now offer in evidence bill of Pacific Telephone & Telegraph Company, made out to Eddie Marron, 1249 Polk Street, with a stub attached for toll service, $8.19, and service charge $4.00, being to October 1, 1924, with a list of calls attached.

Mr. SMITH. May the same objection be considered as having been made to the introduction of this particular exhibit?

The COURT. Yes. Objection overruled.

Mr. SMITH. Exception.

Mr. SMITH. And may the same objection be considered as having been made heretofore, and on the further ground that it is hearsay and not binding on the defendant Marron, and that it is immaterial, irrelevant and incompetent?

The COURT. Objection overruled.

Exception No. 9.

Mr. BONSALL. I now offer in evidence a bill of the Coulter Rattan Works dated September 23, 1924, made out to Eddie Marron, for chairs and tables and rugs in the sum of $213.50. I ask that this be given the appropriate exhibit number.

Mr. SMITH. The same objection is interposed to the introduction of this exhibit upon all the grounds heretofore urged to the others.

The COURT. Objection overruled.

Mr. SMITH. Exception.

Mr. BONSALL. Q. Mr. Whittier, I show you this document and ask you if you have ever seen it before?

A. Yes, sir.

Q. Where did you find that?

A. I could not state in what part of the place.

Q. But it was found on the premises?

A. Yes, sir.

Q. On the day in question?

A. Yes, as far as I remember; you know we were there twice.

Q. Yes, I know you were there twice, but to the best of your recollection it was on October 2d, when you found these?

A. Yes, sir.

Exception No. 10.

Mr. BONSALL. I now offer in evidence and request that it be given the appropriate number, a telephone receipt made out to Eddie Marron for telephone No. Pro. 4953, 1249 Polk Street, in the sum of $16.12.

Mr. SMITH. May the same objection be considered as having been made to this?

The COURT. Yes. Objection overruled.

Mr. SMITH. Exception.

Exception No. 11.

Mr. BONSALL. I offer in evidence a receipt of the Spring Valley Water Co. for water at 1249 Polk Street for the term ending August 25, 1924, for $2.80.

Mr. SMITH. The same objection.

The COURT. Objection overruled.

Exception No. 12.

Q. I show you these slips and ask you if you have ever seen them before? I will also show you the envelope they were in.

A. Yes.

Q. When did you first see these papers?

A. Yes, I think those were in that book.

Q. On October 2, 1924?

A. Yes, sir.

Q. At 1249 Polk Street?

A. Yes, sir.

Q. In what book were they?

A. The gray ledger.

Q. You mean United States Exhibit No. 1 on this trial?

A. Yes, sir.

Mr. BONSALL. "Sept. 28, Bill Windler $10. Birdsall $20, Sept. 8. Birdsall $50, September 18, Change $100; Marron $60; Slot Machine $30. Col. Bevin $5, September 21, 1924." These five slips of paper with longhand writing on them are now offered in evidence as Government's Exhibit 8.

Mr. SMITH. We object on all the grounds heretofore urged, and on the ground that they are immaterial, irrelevant and incompetent, and not in the handwriting of the defendant, and, therefore, they are not binding upon him; on the further ground that there has been no prima facie case of conspiracy established.

The COURT. Objection overruled.
Mr. SMITH. Exception.

Exception No. 13.

Mr. BONSALL. Q. I show you this paper and ask you if you ever saw that before?
A. Yes, sir.
Q. Where did you find that?
Mr. BONSALL. Q. When did you find it?
A. October 2, 1924.
Q. Where did you find it?
A. In that gray book.
Q. At 1249 Polk Street, in the City and County of San Francisco, California?
A. Yes, sir.
Mr. BONSALL. I will now offer this statement in evidence. I will read it to the jury at this time.
Mr. SMITH. To which, of course, we object, may it please the Court, upon all of the grounds heretofore urged with respect to the other papers and documents that were seized, upon the ground that it is hearsay as to the defendant Marron; upon the further ground that no prima facie case of conspiracy has been as yet established, and that it is inadmissible as evidence for the reasons heretofore urged.
The COURT. Objection overruled.
Mr. SMITH. Exception.

Cross-Examination.

I don't know if anybody was with me at the time I found the book. I didn't think anything of the book, to tell you the truth. I won't state that I found that book myself or that it was found by someone else and then called to my attention. I think Howard found the book, if I am not mistaken. I am not positive whether Howard found the book, or whether I found it. I think Howard brought it in. I don't know whether I found it and then threw it on the table after asking Birdsall if that was not his name. I think I went to the closet first where this book

was found. Birdsall gave me the key. I told him I wanted the keys. I handed him the search-warrant and let him read it. I either told him I wanted the key or I told him to open the door. I could not tell you whether it was Mr. Howard that got the key for that closet. I would have to look at that book again to be exact. Agent Howard and I went in there to where we found the champagne in the closet in the front room. I know where the book was found, all right, but I don't know whether I found it, or whether Agent Howard found it. I know it was there.

Agent Howard is now in the Leavenworth Penitentiary. I am no longer in the service. I have been out of the service since last October.

Mr. SMITH. Q. Mr. Whittier, I show you a copy of a warrant dated October 1st, issued by Commissioner Hardie, supported by an affidavit made by C. A. Howard, the affidavit being dated October 1, 1924, and I ask you if you have ever seen that instrument before, and, if so, when and where?

A. Yes, I saw it.

Q. When?

A. They handed it out to me, I think, on the 2d of October. I think on the second of October. The agent in charge, Mr. Shurtleff, gave it to me. It was not given to me by the Commissioner himself. Agent Shurtleff gave it to me.

Q. What instructions, if any, did Mr. Shurtleff give you?

Mr. BONSALL. That makes no difference, because it is an absolute mandate of the Court requiring the officer to serve it.

The COURT. Objection sustained.

The WITNESS (continuing). It was by virtue of this warrant that I went to 1249 Polk Street.

Exception No. 15.

Q. While you were at 1249 Polk Street everything you did while there you did under and by virtue of the authority vested in you by that warrant?

Mr. BONSALL. The warrant speaks for itself. The return speaks for itself. I object to the question as immaterial, irrelevant and incompetent.

The COURT. It calls for the conclusion of the witness. The objection is sustained.

Mr. SMITH. Exception.

Exception No. 16.

Q. Mr. Whittier, at the time that you seized these bottles that have been introduced in evidence, did you seize those bottles under your general authority as a prohibition agent, or did you seize the bottles under and by virtue of the special authority vested in you by this warrant and granted to you by the warrant?

Mr. BONSALL. Just a moment. The return on the search-warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. Exception.

Q. Mr. Whittier, at the time you seized Plaintiff's Exhibit No. 1 and the other papers and memoranda that have been introduced in evidence here and marked U. S. Exhibits 2 to 9, were you acting under and by virtue of the authority granted you in this warrant, or were you acting under your general authority as a prohibition agent?

Mr. BONSALL. We object to that as calling for the conclusion of the witness, and as immaterial, irrelevant, and incompetent, and the warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. Exception.

Exception No. 17.

Q. Mr. Whittier, at the time you took the book and the papers that I have heretofore referred to, did you at any time ever make a return to a United States Commissioner showing that you had seized those books and papers under that warrant?

Mr. BONSALL. Again I submit that the return on the search-warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. At this time I ask that the search-warrant I showed the witness, supported by the affidavit of C. A. Howard, and dated October 1, 1924, be introduced in evidence and marked Defendant's Exhibit 'A'.

The COURT. It may be admitted and so marked.

(Thereupon the document was introduced in evidence as U. S. Exhibit 'A'.)

Mr. SMITH. Together with the return that appears on the reverse side thereof.

The COURT. Yes. What is your point—that the return does not show the gray ledger?

Mr. SMITH. Yes, your Honor.

The COURT. All right.

The WITNESS (continuing). The book was found on a shelf, and was not in the same room that the liquors were. The champagne was in a trap down under the floor in a closet."

This testimony was corroborated by various other witnesses for the Government who were present at the time of the search and seizure, but as there is no material variance in their testimony, we will refrain from further references; however in addition thereto a handwriting expert was qualified and testified that the handwriting contained in the ledger was that of petitioner.

THE LAW.

PROPOSITION I.

The law governing seizures and searches and warrants, as expressed in the Fourth Article of the Amendments to the Constitution of the United States is as follows:

> "Section I. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon reasonable cause supported by oath or affirmation, *and particularly describing the* place to be searched and the persons or *things to be seized.*"

The Fifth Article of Amendments to the Constitution relating to criminal proceedings and condemnation of property reads:

> "Section I. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself;* nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

No useful purpose can be subserved by an elaborate and extended argument as to the meaning and construction of language so clear and unambiguous. For the purpose of sustaining petitioner's position in the premises, the objections to the seizure of these private documents and their subsequent introduction into evidence may be designated as follows:

> a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of the defendant under the Fourth Amendment to the Constitution of the United States of America, for the reason that

said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.

c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described property, to-wit:

> Intoxicating liquor, to-wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises hereinabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

It may thus be observed that in the presentation of these objections, the rights of the plaintiff in error under the Fourth Amendment to the Constitution of the United States, and under the Fifth Amendment to the said Constitution are being treated as having involved separate and distinct violations for the pertinent reason that while there may be an interrelation between these amendments in so far as the rights of persons are concerned, we assert that a justification under one does not afford an excuse for a violation under the other. Admittedly, in the instant case, neither the ledger nor any of the other private memoranda seized upon that occasion were described in either the warrant or the affidavit, nor were they even remotely referred to.

The evidence showed that the agents had in fact completed the object of their visit when they had reduced to their possession the intoxicating liquors found thereon, and that the seizure of the ledger and the other private documents was made after their authority under the search-warrant had been exhausted.

The significance of the language of the Fourth Amendment "particularly describing the place to be searched and the persons or things to be seized" is of supreme importance in guiding us in our endeavor to demonstrate the violation of the rights of the petitioner under this amendment. We assume that it will be unnecessary to unduly lengthen this brief to demonstrate the wisdom and the policy of the framers of this amendment in the use of words so simple and yet so clear.

Innumerable decisions of our Federal Courts have construed their meaning, and we are not compelled to go far afield in our research for decisions to fortify our position. In fact, the Circuit Court of Appeals for the Ninth Circuit, in the case of *Hagen v. U. S.*, 4 Fed. 2d. 801, had occasion to consider a similar contention under facts which bear a startling similarity to the facts in the instant case, and it is worthy of comment that the *Hagen* case was not referred to by the learned Judge who wrote the opinion in the first *Marron* case.

The facts in the *Hagen* case were briefly these: A prohibition agent testified that he went to the dwelling house of defendant Hagen and, after serving the search-warrant upon him, proceeded to search his house and found therein certain intoxicating liquors. In addition to the seizure of these intoxicating liquors, the agents likewise seized a certain book, together with some papers and cards which were on the person of Hagen and which were subsequently introduced into evidence upon his trial for conspiracy to violate the National Prohibition Act. The question before the Circuit Court concerned the validity of the search-warrant.

The Commissioner issued the warrant, commanding the prohibition officer to enter the premises described in the affidavit and to then and there diligently "investigate and search the same, and into and concerning said crime, and to search the person of said Ed Hagen and employees, and from him or her, or from said premises, seize any and all of the said property so used in or about the commission of said

crime, and then and there take the same into possession, and a true report make."

The officer returned the warrant, stating that he had found certain described quantities of whiskey and beer and various letters, books, papers, cards and accounts in possession of the various defendants. It appears, therefore, that both the affidavit and the search-warrant were broader in the *Hagen* case then they were in the *Marron* case, for the reason that in the *Hagen* case they specifically referred to property used as the means of committing a crime, and the officer who made a return on the search-warrant likewise described the seizure of said private books and memoranda which was not done by the officer who made the return upon the warrant in the *Marron* case. In reversing the judgment of conviction for the crime of conspiracy against Hagen, the Circuit Court of Appeals for the Ninth Circuit condemned the search and seizure in the following language:

> "Nor was there any statement that in the house there were documents or books or memoranda tending to show unlawful sale of intoxicating liquor, *or that Hagen had in his personal possession any writings or other evidence connecting him with a violation of the prohibition law, nor was there any attempt to describe the books or documents or papers to be seized from Hagen, or anybody else.*"

That Hagen's rights under the Fifth Amendment to the Constitution were violated by the reception into evidence of these private memoranda and books of account, was likewise affirmed in the decision with this language:

> "The legal effect of such a search and seizure of papers was to force the person seized to become the unwilling source of evidence against himself, and put him in a position where he can invoke that protection afforded him by the Fourth and Fifth Amendments to the Constitution and by the Acts of Congress."

We again call to the attention of this Honorable Court the undisputed fact that the search-warrant in the instant case described no article or thing other than intoxicating liquors and paraphernalia used in their manufacture.

As stated above, the learned Judge who wrote the original Marron opinion not only failed to recognize the doctrine in the *Hagen* case, but neglected to even comment upon the principle involved therein. He relied solely upon the case of *U. S. v. Sayers,* 2 Fed. 2d 146, Ninth Circuit, which case we assert is unlike the present case in point of fact as well as in point of law.

It should be noted in passing that the defendant in the *Sayers* case was convicted of the unlawful possession and sale of intoxicating liquors, while in the instant case the petitioner was convicted of a felony, to-wit: criminal conspiracy.

The portion of the opinion in the *Sayers* case material to the present discussion is as follows:

> "A lawfully arrested person may be searched for instruments, fruits and evidence of the crime; and if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended.

> This is the law since the 4th Amendment, even as it was law before it, is reasonable, and is not within the Amendment's ban upon unreasonable searches and seizures. * * *
>
> In any such search not only may the instruments and fruits of crime be seized, but mere evidentiary articles including papers incidentally discovered may be likewise seized. This was expressly held in Adam's case, supra, and has not been departed from in any qualification of said case. 'There is no special sanctity in papers as distinguished from other forms of property, to render them immune from search and seizure, *if only they fall within the scope of the principles of cases in which other property may be seized.' Gould's case, supra.* Of a person arrested every garment and pocket may be searched, and the same principle authorizes that of a building, generally every room may be searched."

We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed, nor is a citation of authorities necessary to fortify the legality of seizures of the many evidences of crimes, of which the seizure of burglar tools and other indicia of crime offer typical examples.

But all of these cases are bottomed upon the assumption that the fruits and tools and other evidences of crimes have on first blush such a real and substantial relation to the crime or offense in the detection and apprehension of which the instrument was seized, that they form an integral part and parcel of the crime.

There is, however, such a real and substantial distinction between evidences of crime in the nature of burglar tools and articles of that character and private memoranda and documents of the character considered in the instant case, that the mere statement of their nature must, in and of itself, be sufficient to demonstrate the difference.

The proposition that is now being contended for before this Court, is by no means a novel one, and as will be hereafter shown, various District and Circuit Courts throughout the country have had occasion to consider it and have uniformly held in support of petitioner's position.

We invite attention to the case of the *United States v. Mills,* 185 Fed. 318. This proceeding came before the Circuit Court of New York on the petition for instructions to be directed to the United States Marshal, of that District, and the District Attorney, to return to defendants certain books and papers which had been seized pursuant to a bench warrant.

The defendants were co-partners and were indicted for conspiracy to defraud the United States as a result of false and fraudulent invoices alleged to have been made by them on foreign merchandise. A bench warrant for the arrest of the defendants was issued, and the Marshal, in addition to arresting the defendants, searched for, found, seized and removed from the premises of the defendants a large number of books and papers, which were subsequently delivered to the District Attorney.

The bench-warrant referred to the indictment commanded the marshal to arrest the three defendants,

describing particularly the persons to be seized, but not particularly describing the place to be searched and the *things to be seized.*

The Court said (page 319):

> "When executing the bench-warrant, the marshal seized not only the documents concerned in the particular importation of December 3, 1906, but also all the books and papers of the firm covering their business above referred to. Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury that 'further indictments, charging additional offenses than those contained in the indictment already found, could be found'.
>
> It may be highly desirable, from the point of view of a prosecuting officer, that some such comprehensive seizure of a person's books and papers should be had; the trial of an offense thus charged may be thus facilitated, and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is 'much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society'. Opinions will differ as to which is the wiser public policy. But, whatever may be one's individual opinion, it is difficult to see how a subordinate federal court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to do not indicate that the practice followed in this case should be approved.

> In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the court is careful to point out that the only question before it was as to the introduction in testimony of papers found on defendant's premises at the time of his arrest."

A similar question was presented to the Circuit Court of Appeals of the Second Circuit, in the case of *Fitter et al. v. United States,* 258 Fed. 567. The facts were as follows:

The defendant claimed that he was forced to furnish incriminating evidence against himself, and that he was convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. * * * It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States Secret Service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of whom wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger". Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see

the delivery slips, papers and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the United States Attorney for the Eastern District of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which has been unlawfully seized, and by direction of the Court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search-warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, provides, *inter alia,* that no person—

> "shall be compelled in any criminal case to be a witness against himself".

In the *Petition of Barber,* 281 Fed. 550, the facts were practically identical with the facts in the instant case, and it is difficult to preceive how a distinction may be drawn between the principles controlling this case and the principles for which we are contending in the present case.

The *Barber* case arose as a result of a petition filed, seeking the return of certain malt, hops, rye, sugar, bottles, and other paraphernalia intimately connected with the manufacture and disposition of intoxicating liquor, *together with certain books, letter files, ledgers, papers, records, advertising matter, and stationery used in the conduct of the business of petitioner, namely, selling hops, malt, materials, supplies and other merchandise which he alleged were unlawfully seized and taken from his place of business in the City of Detroit.* The affidavit upon which the search-warrant was issued is quoted at length in the opinion, as is likewise the search-warrant referred to, and we direct the attention of the Court to that portion of the search-warrant material to our discussion.

> "Now, therefore, in pursuance with the provision of the law and particularly the National Prohibition Act, relating to the prohibition of the sale and possession of malt, hops, capping machines, caps, bottles and other utensils and property designed for the manufacture of liquor intended for use in violating the National Prohibition Act,

and upon probable cause shown, you are hereby authorized to enter the said premises in the day with the necessary and proper assistance, and thoroughly search the premises aforesaid for all subjects and evidence of fraud against the government of the United States and for violation of the National Prohibition Act, including the property above mentioned, to the end that such violations may be discovered and restrained, and that all offenders and property forfeited may be dealt with according to law, and hereof made due return without delay.

"Witness the hand and the official seal of the said commissioner, at Detroit, Michigan, in said district, this 3rd day of March, A. D. 1922.

(signed) J. Stanley Hurd,
United States Commissioner, Eastern District of Michigan."

Various objections were raised by Barber as to the validity of the search-warrant, among one of which was the following:

"That said search warrant did not expressly command the seizure of the property found by the search, but left indefinite and discretionary the property to be seized by the search."

The Court's disposition of various objections is not germane to this discussion, excepting the conclusion arrived at, based upon the objection hereinbefore set forth.

" * * * It is not claimed by petitioner that any person was misled or prejudiced by such description, and I cannot doubt that the objection based upon the alleged indefiniteness of description of such property or supposed variance between the property so described and the property seized must be overruled, *except as to the books, files, ledgers, records, advertising matter, stationery, and papers seized, but not described nor*

mentioned in the affidavit or in the search warrant.

It is plain that, as the latter were not described nor even mentioned in the affidavit or search warrant, their seizure thereunder was unauthorized for that reason, even if otherwise subject to seizure, and, if actually seized and still retained, they must be forthwith returned to petitioner. United States v. Mills, 185 Fed. 318; Fitter v. United States (C. C. A. 2), 258 Fed. 567, 169 C. C. A. 507."

In *United States v. Hills,* 263 Fed. 812, the proposition is so succinctly stated that we take the liberty of quoting the decision in full:

"It appearing, upon inspection, that the description in the search warrant contained of the things to be seized thereunder did not embrace any papers or documents of the defendant, and that therefore it was not broad enough to include the letter from Alonzo Taylor to the defendant, dated April 14, 1919, the defendant was on his petition heretofore filed herein, entitled to a return of the said letter, and an order may be so taken. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; U. S. v. Friedberg (D. C.), 233 Fed. 313; State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

And it further appearing that the said letter was improperly admitted in evidence against the defendant's exception, and that the same was prejudicial to the defendant, the verdict will be set aside, and a new trial of this cause granted."

See also:

Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654;

U. S. v. Porazzo Bros., 272 Fed. 276.

PROPOSITION II.

Kirvin v. United States, 5 Fed. 2d 282, should be followed as an authority on the facts in the instant case rather than the first decision in *Marron v. United States,* 8 Fed. 2d. 251. Judge McCamant, who wrote the opinion in the *Marron* case, disposed of the law as enunciated in the *Kirvin* case, in the following language at page 256 of the report:

> "The defendants rely on Kirvin v. U. S. (C. C. A. 2), 5 Fed. 2d 282. It may be conceded that this decision cannot be reconciled with the views above expressed. We have great respect for the Court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S., 2 Fed. 2d 146, was correctly decided."

The *Kirvin* case came before the Circuit Court of the 2nd Circuit under the following circumstances: An application had been made by Harold A. Kirvin to quash, vacate and set aside a search-warrant affecting the premises located at No. 191 Front Street, Borough of Manhattan, City of New York, and for a return of records, papers and documents seized thereunder. The original application was made before the United States Commissioner who sustained the application. Thereupon the District Court of New York reviewed the action of the United States Commissioner and duly gave his order reversing the action of the Commissioner. Thereafter the petitioner appealed to the United States Circuit Court of Appeals, which Court in turn reversed the action of the United States District Court. The facts briefly are these: A search-warrant was issued on the 18th day of December, 1923, by one

of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, *together with any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors.*

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

It is worthy of comment at this time to state that not only the affidavit in this case but the search-warrant itself directed the officers to seize not only the liquor in question, but contained likewise an omnibus direction to seize records, papers and documents; it would appear therefore that the search-warrant was to that extent more comprehensive than the search-warrant in the instant case, for here the warrant is silent as to things to be seized other than intoxicating liquors and paraphernalia used in their manufacture. The first contention made in the *Kirvin* case, and the

first contention made in the instant case, that as to the records seized, the search-warrant was issued without probable cause, is answered by that learned Court in the following language:

> "We need not consider the sufficiency of the allegations as to the liquor seized for that seizure is not now questioned. The affidavit in no place refers to any record being used in connection with the sale of alcohol, and there is no description of the records, papers, or memoranda of any kind. The only reference to it is in the last few lines in the affidavit, which says, 'and to seize all intoxicating liquors found therein, together with any papers, books, records or documents pertaining to the sale, possession or transportation of intoxicating liquors'. This allegation does not warrant the seizure of papers nor could any testimony before the commissioner supply what is here missing."

One of the arguments of the Government in that case, and the principal argument of the Government in this case, which contention the learned judge who wrote the opinion for this Court in the *Marron* case, evidently adopted, was that the records, papers and documents so seized were means or instruments or fruits of crime.

We can do no better than to quote the language of the *Kirvin* case in answer to this contention:

> "We cannot agree with the government's argument that the records were means or an instrument of crime. They might be some evidence of crime. Gouled v. U. S., 225 U. S. 310, 41 S. Ct. 261, 65 L. Ed. 647. The legality of the search-warrant may become the very foundation upon which the successful prosecution of a guilty defendant depends. The constitutional rights guar-

anteed by the Fourth Amendment of the Constitution must be equally enforced in favor of the guilty and innocent. Unless sufficient facts are shown under oath to support the finding of a probable cause, the right of a person to be secure from unreasonable searches and seizures must not be violated. Silverthorne Co. v. U. S., 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. A search-warrant must be as broad, and no broader, than justifying the basis of fact. It is not every kind of property that may be seized under a search-warrant. It is intended that the warrant be issued with the privilege to seize such property as was used as the means of committing a felony. All papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure. Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338."

The next contention of the Government in the *Kirvin* case was that the officers who were executing the warrant were lawfully on the premises, and, being there, they might seize the papers in question. That contention is answered in the following language:

> "But as to the records they had no search-warrant. They were as trespassers in taking these documents."

The next contention was that the plaintiff in error, Kirvin, was arrested at the time the papers were seized and therefore the seizure was lawful.

> "But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one

keeps in his house. A search-warrant cannot be extended beyond the privileges granted in its issuance. Nothing further may be included. There was neither identification of the records, nor probable cause alleged in the affidavits for the seizure of the records, and their taking was illegal, and therefore void."

We are aware that as the result of the complex structure of the various Federal Courts of the United States, numerous conflicts in the decisions of the various Courts are found, but we assert that a research of the various decisions will fail to disclose a more startling conflict in authority upon a question that involves rights of such a fundamental character.

It is impossible to distinguish the *Marron* case and the *Kirvin* case for the purpose of reconciling either the law or the facts.

PROPOSITION III.

Marron v. United States, 8 Fed. 2d 251, is in direct conflict with the decision of *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647 and with *U. S. v. Katz,* 70 L. Ed. 554; U. S. S. Ct. Advance Opinions, June 15, 1926, and should, therefore, be expressly overruled.

It has been suggested herein that both the Circuit Courts of Appeal of the Ninth and the Second Circuits have relied upon the decision of this Court in *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647, and have placed two entirely opposed interpretations upon it.

It would appear from an examination of the *Gouled* case that the language contained therein is susceptible of but one construction and interpretation, and that as expressed in the *Kirvin* decision.

An examination of the case will disclose that six questions were certified to the Court by the United States Circuit Court of Appeals for the Second Circuit.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted. An appeal was prosecuted, and the matter came before the United States Supreme Court for a certification of six questions.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the Army. With this feature of the case, namely, the surreptitious and furtive taking of a man's papers, we have no concern.

We repeat that we are not concerned with that portion of the opinion disposing of these questions. The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants*, and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (Firstly), Surreptitious and furtive taking of a man's private documents; and (Secondly) the seizing of them *under a valid search-warrant.*

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and a third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the constitutional objections of Gouled, to-

wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglars' tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized, but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. (Boyd v. United States.)

> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pur-

suant to the Act of June 15, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?"

"That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners, and are property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

"Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment: While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

"Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

"As to the contract with Steinthal, also a stranger, to the indictment: It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in perpetrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the

papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than as evidence against the accused; and, therefore, as to all three papers, the answer to the question must be in the affirmative."

The fourth question reads:

"If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?"

The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the *Boyd* case to compel the defendant to become a witness against himself.

The next question in order for consideration related to the violation of the defendant's rights under the Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion,—

The fifth question reads:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?"

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search-warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search-warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

The sixth question inquired as to the duty of the trial Court to inquire into the origin of and the method adopted in procuring the papers when the documents are offered in evidence against the party indicted. The Court answered the question as follows:

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to deter-

mine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

This Court has had occasion to disapprove of a portion of the *Marron* opinion by its recent decision in the case of *U. S. v. Katz,* 70 L. Ed. 554.

The learned judge who wrote the opinion in the *Marron* case, as one of the grounds upon which he fortified his conclusion as to the legality of this seizure, relied upon the provisions in Section 10 of Title 2 of the National Prohibition Act. (41 St. 312, Sec. 8351i of Barnes Code 1924 Supp.; U. S. Comp. St. par. 10138½e.) See page 255.

That section provides:

"No person shall manufacture, purchase for sale, sell or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and

consignee in case of transportation, and the time and place of such manufacture, sale or transportation. The Commissioner may prescribe the form of such record, which shall at all times be open to inspection, as in the act provided."

Section 34 of the same title, Comp. St. Ann. Supp., par. 10138½u, provides that the records required by Section 10, aforesaid "shall be subject to inspection at any reasonable time by the Commissioner, or any of his agents, or by any public prosecutor, or by any person designated by him."

The opinion of the first *Marron* case continues as follows on page 255:

"The gray ledger does not contain all of the information called for by section 10 of title 2 of the Prohibition Act, but it contains a more or less complete record of the liquor purchased, a record of the sales from day to day and in some cases the names of the purchasers. Such a book is not like the private papers of a citizen. It is subject to inspection by a number of persons, and the statute requires it to be kept as a permanent record. It is true that the gray ledger contains other matter in addition to that which the statute requires to be kept, but a party who records his affairs in a book subject to inspection cannot complain of the consequent invasion of his privacy."

In the *Katz* case it was definitely held that the provisions of these sections respecting the keeping of records of the sales, etc. of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make unlawful sales. After a review of various Federal cases concerning the interpretation to be given this section,

Mr. Justice Stone concludes the opinion with this language:

> "We think the reasoning of these cases applicable here and that the words 'nor person' in paragraph 10 refer to persons *authorized under other provisions of the act to carry on traffic in alcoholic liquors.*"

PROPOSITION IV.

The Court erroneously permitted the witness Neilsen to give evidence, which if believed, disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment, or the scope of the conspiracy as gathered from the testimony, and in that connection gave to the jury instructions which contained gravely erroneous and prejudicial errors of law.

This particular point is covered by specifications of error Nos. 4 and 5. The error complained of relates to the action of the trial Court in permitting the witness Neilsen to testify to certain transactions had with this petitioner and in charging the jury in the language hereinafter set forth. The defendants Walter Grand, Charles Mahoney and George Hawkins, George Birdsall and Joseph Marron are charged in the indictment with the crime of conspiracy to violate the National Prohibition Act in various respects in maintaining a common nuisance and in possessing liquor at 1249 Polk Street in the City of San Francisco. The defendants Gorham and Kissane are accused by the indictment as co-conspirators in that they in their capacity as Police Officers received money from the

defendants above mentioned for the purpose of securing these defendants against interference in the illegal conduct of their business.

The purposes of the conspiracy are stated in thirty-four sub-paragraphs and it is further alleged in the indictment that in aid of the conspiracy and for the purpose of effecting and accomplishing the objects thereof eleven particular overt acts were committed. The indictment is lengthy and covers forty-seven pages of printed transcript. (Trans. pages 3-50.)

Upon the trial of the action many witnesses testified as to the illegal sale of intoxicating liquor upon the premises which evidence was elicited for a two-fold purpose namely the establishment of sale of intoxicating liquor on the premises and for the establishment of the fact that the said premises were a common nuisance as defined by the provisions of the National Prohibition Act.

The witness Neilsen did not testify upon the trial of the first action in January, 1924, nor was he indicted by the Grand Jury as a co-conspirator.

Upon the trial of the present action he testified as follows:

That he was convicted of a felony and at the time of this trial was serving a sentence in the county jail at San Rafael; that he knew the petitioner Marron and visited him at 1249 Polk Street in 1924.

> "Mr. WISEMAN. We object to that as immaterial, irrelevant and incompetent and on the further ground that any business that he might have had at 1249 Polk Street is not binding on

the defendant unless there is a prima facie case of conspiracy established; and on the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy—not alleged in the indictment.

The COURT. Objection overruled. It is preliminary, we don't know what they are attempting to prove yet.

Mr. WISEMAN. Exception."

That at the time of his first visit at these premises he saw the defendant Marron and the purpose of his visit was to get an order from Marron to go out to the "Malahat", a rum ship.

"Q. Did you go out to the 'Malahat' with that order?

Mr. WISEMAN. Just a moment, we make the same objection, your Honor, and upon the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy and directly on all fours with the Terry case.

The COURT. Objection overruled."

Mr. WISEMAN. Exception."

That he got this order from Marron, visited the "Malahat", returned with about one hundred cases of Scotch whiskey and landed it around Mission Rock in the City of San Francisco. (Trans. pages 232-238.) He further testified that he did not know who was present at the time he brought the liquor ashore.

"Q. Who were there at the time this liquor was landed?

Mr. WISEMAN. If your Honor please, as far as the incident of the 'Malahat', and the liquor, and the landing of the liquor, we renew the objection on the ground it is immaterial, irrelevant and incompetent, and, further, it is an attempt to show

an overt act not alleged in the indictment, either measured by the indictment, itself or by the testimony as elicited during the trial.

The COURT. Objection overruled. As I understand it, every overt act does not have to be alleged.

Mr. WISEMAN. But the conspiracy must be measured by the allegations of the indictment, or the testimony elicited from the witness on the trial. The same situation developed in the Terry case.

The COURT. Objection overruled.

Mr. WISEMAN. Exception."

That he was paid for the load of liquor at 1249 Polk Street by the defendant Marron and received the sum of three hundred dollars ($300.00).

On March 17, 1924, he received another order from Marron to go to the "Prince Albert", a rum ship, and his testimony from this point is set forth at length:

"WITNESS (continuing). I did not land that liquor because I got swamped during the night. I went to Marron and told him how it happened. I went to see him at 1249 Polk Street in this city and county and state. I went to see him there after it happened, about a day or two after I came ashore. I just told him I lost them, and he told me it was too bad that I had to lose my boat. I did lose my boat at that time. I took off 150 cases from the 'Prince Albert'.

Q. Did you get that order filled at the 'Prince Albert'?

Mr. WISEMAN. We make the same objection to the 'Prince Albert' incident as we made to the 'Malahat' incident, and to the incident of the landing of the liquor.

The COURT. Very well; objection overruled.

Mr. WISEMAN. Exception.

A. Yes, sir.

There was some champagne and some Scotch. I was to get the same price for that, $3.00 a case. He did not make any other reference to the loss of that liquor, the defendant Marron. I think I made one more trip later on for the defendant, after that. I don't know exactly, it was between that time and probably two or three months later. I don't know. I am not sure.

Exception No. 82.

Q. What boat did you make that trip with?

Mr. WISEMAN. Just a moment. We renew our objection to this incident, the same as to the other incidents, upon the same ground.

The COURT. Very well; objection overruled.

Mr. WISEMAN. Exception.

WITNESS (continuing). I had an order at that time furnished by the defendant, Marron. I was to go to the 'Malahat', if I remember right. I did go to the 'Malahat'; I did present the order. I went out there on the boat that the Government seized. The name of the boat was the 'L. C. L.' They gave me the liquor on that order, and I loaded it on the 'L. C. L.' I brought the liquor ashore. I think it was 150 cases; I think it was landed on pier 20, between pier 20, or 22, in this city. It was around midnight that I brought it ashore. I saw the defendant, Marron, at that time. I believe I did. No, I don't think I saw him when I first came ashore at that time. I don't think then, but he came right afterwards. I waited around a while and then he made his appearance. It took me about an hour and a half to get the liquor up on the wharf. I saw a truck on the shore; there was a truck standing there. I got paid for carting that liquor, at 1249 Polk Street in this city. I saw the defendant there. Eddie Marron paid me for this lot of liquor, Eddie Marron himself. It was about a day or two after the liquor was landed on shore before I went to get my money. He paid me $3.00 a case. All told that would be $450.00. He paid me in

currency; he usually paid me in one of the front rooms at 1249 Polk Street." (Trans. pages 239-241.)

This testimony was objected to by counsel upon the ground that it was immaterial, incompetent and irrelevant, that it was an attempt to prove overt acts being neither charged nor alleged in the indictment and that the acts themselves were not shown either by the indictment or by the testimony to have been done for the purpose of effecting the object or purpose of the conspiracy for which the defendant Marron was then standing trial. The Court overruled the objections made to which rulings the defendant Marron duly excepted. (Trans. pages 232-241.) At the conclusion of the testimony the petitioner Marron moved to strike out all of the evidence of the witness Neilsen on the same grounds that were urged in the objections to the introduction of the evidence.

"Exception No. 83.

Mr. WISEMAN. For the purpose of the record, I make a motion at this time to strike out all of the testimony of the witness Neilsen in so far as these incidents concerning the landing of liquor from these various ships, together with the landing at the wharves, and its transportation, on the ground that it is immaterial, irrelevant and incompetent, they are not charged or alleged in the indictment on file herein on which the defendant Marron, is now standing trial, they are not shown by either the indictment, or by the testimony, to have been done in furtherance of or for the purpose of effecting the object or purpose of the conspiracy.

The COURT. Motion denied.

Mr. WISEMAN. Exception."

This motion was denied by the Court and to which ruling the petitioner Marron then and there duly excepted. (Trans. page 247.)

And at the conclusion of the charge of the Court to the jury defendant duly excepted to the language of the Court concerning his activities with the witness Neilsen.

The particular language employed by the Court in this connection is covered by Assignments of Error Nos. 95-100 inclusive and is as follows:

> "In order to sustain the indictment, it is necessary that the government prove one or more of the following overt acts charged in the indictment.
>
> "That on November 17, 1923, at 1249 Polk Street, former Police Officer Patrick Kissane received the sum of $5 from George Birdsall, alias George Howard, for the express purpose of furthering the said conspiracy, and with the intention so to do."
>
> "That on March 31, 1924, former Police Sargeant Joseph Gorham received at 1249 Polk Street from George Birdsall, alias George Howard, the sum of $90 for the purpose of furthering such conspiracy, and with the intention so to do."
>
> "That in November, 1923, George Birdsall, alias George Howard, sold intoxicating liquor at 1249 Polk Street, in furtherance of said conspiracy, and with the intention so to do."
>
> "That on May 15, 1924, Joseph E. Marron, alias Eddie Marron, maintained a nuisance at 1249 Polk Street by keeping for sale on the premises at 1249 Polk Street intoxicating liquor in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same."
>
> "That on May 15, 1924, George Birdsall, alias George Howard, maintained a common nuisance

at 1249 Polk Street by selling liquor at 1249 Polk Street in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same. However if the Government has proven any one of these overt acts alleged in the indictment they may prove any other overt acts by the conspirators named in the indictment or with unnamed conspirators in furtherance of the object of the conspiracy."

"In this regard, I charge you that if the Government has proven any one of the five overt acts mentioned, you are entitled to consider the testimony of the witness Neilsen, if you believe his testimony to be true, who testified as to making three trips to rum-running ships in the Pacific Ocean at the request of the defendant Marron, upon his order, and receiving three cargoes from the rum ships pursuant to the said orders, of his landing two boat loads of liquor in the City of San Francisco from such rum ships, pursuant to the orders obtained from the defendant Marron; and of his testimony that he was paid $3 per case for liquor so transported from the rum-running vessels at the defendant Marron's request, at 1249 Polk Street, in the City of San Francisco, by the defendant Marron—as to whether or not a conspiracy was established as alleged in the indictment."

To which ruling the petitioner then and there duly and regularly excepted. (Trans. pages 304-305; 497-499.)

It is the contention of petitioner that the admission into evidence of this testimony by the witness Neilsen is condemned by the case of *Terry v. United States,* 7 Fed. 2d p. 28, and that the instruction given by the Court to the jury is likewise in conflict with the law as established by that decision.

It will be observed that the indictment in the instant case charges a criminal conspiracy to violate the National Prohibition Act. It did not charge nor did the Government contend upon the first trial of this action that the defendants conspired to violate the Act of September 21, 1922, commonly known as the Tariff Act of 1922. The evidence of the witness Neilsen if believed, discloses a separate and distinct conspiracy and one which if true was of as serious a nature and character as the one charged in the indictment.

The indictment charged no conspiracy to transport, possess or sell smuggled liquor from the foreign rum ships and no overt act was averred that would have the most remote tendency to effect the object of such a conspiracy. This Court at page 30 of the *Terry* case expressed itself as follows:

> "Proof that the plaintiff in error was guilty of another crime was in itself prejudicial."

The testimony of Neilsen may be searched in vain for any reference direct or circumstantial tending to identify the character of any of the other defendants in this action with the transactions of Marron and we are entitled to assume that in so far as the other defendants are concerned they had neither interest in or any concern with these transactions.

Following the language of the *Terry* case therefore and at page 29:

> "There was no testimony of any kind, direct or circumstantial tending to connect any of the other defendants with this prior incident or transaction * * * in short there is no contention in the record tending to connect the defendants other

than Terry and Zucker with any conspiracy except such inferences as may be drawn from their presence at or in connection with the incident at Allen's Wharf and all the overt acts relate to that incident alone and the indictment charges no conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay in terms and avers no overt act for the object of such a conspiracy if one existed."

The portion of the instruction of the Court was therefore particularly erroneous when the jury was told that these transactions might be considered by them as to whether or not a conspiracy was established as alleged in the indictment.

The same contention is made by this petitioner as was made in the *Terry* case, namely, that the charge in the indictment is limited to the alleged conspiracy entered into at 1249 Polk Street and does not extend to or include the incidents with the witness Neilsen (7 Fed. 2d pp. 29-30, Column 2):

"Ordinarily a charge of conspiracy is not circumscribed or limited by averments as to the time when or the place where the conspiracy was formed. The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however diverse its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it.

(4) Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the inci-

> dent at Bodega Bay. On the other hand, every inference from the testimony is to the contrary. There is no testimony tending to show that the parties assembled at Allen's Wharf were parties to a conspiracy to transport, possess, or sell intoxicating liquor at Bodega Bay, six weeks before, or that they had any knowledge whatever of that transaction."

As the Court expressed itself in the *Terry* case the scope of the conspiracy must be gathered from the testimony and further by averments of the indictment. The indictment may limit the scope of the conspiracy but cannot extend it.

In practical effect Gorham and Kissane were convicted of one conspiracy. Birdsall and Mahoney were convicted of another conspiracy and this petitioner was convicted of a conspiracy to smuggle and transport liquor from foreign ships and this in face of the fact that the parties to the various conspiracies and the conspiracies themselves were entirely different in kind and nature.

At page 30 of the *Terry* case:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view and that each of four groups of persons were co-operating without any privity each with the other and not towards the same common end but towards separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count but not even in one indictment * * * In other words a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

See also,

Crowley v. United States, 8 Fed. 2d 118.

CONCLUSION.

This petitioner has set forth at length and commented upon both the evidence in the instant case and the law as interpreted by him in connection therewith, to fairly and impartially present to this Honorable Court the grounds of error upon which he relies.

It is conscientiously and honestly asserted that the rights of this petitioner have been violated, and it is respectfully submitted that the conviction of this defendant was unwarranted and in contravention of the fundamental rules of evidence and in violation of the sacred and long established constitutional rights of a citizen. The writ of certiorari should issue.

Dated, San Francisco,
February 19, 1927.

Respectfully submitted,
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